No. (1)

Supreme Court, U.S.
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In The
Supreme Court of the United States

MADE IN THE USA FOUNDATION,
the class of all consumers in the State of Maryland who have purchased frozen Phillips Maryland Style Crab Cakes or have dined at Phillips Seafood Restaurants during the past three years,

Petitioner,

v.

PHILLIPS FOODS, INC.;
PHILLIPS SEAFOOD GRILL, INC.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Does the Lanham Act authorize consumers or a consumer organization to file suit in federal court to stop a corporation from deceptively labeling the country of origin of a product and sue for damages?

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* = Asterisk denotes authorities chiefly relied on.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petitioner Made in the USA Foundation, a non-profit organization dedicated to promoting American-made, grown and fished products, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit entered on April 19, 2004.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit has been reported at 365 F.3d 278 and is reproduced as Appendix A. The decision of the United States District Court for the District of Maryland was not reported. It is reproduced as Appendix B.

JURISDICTION

The judgment of the Court of Appeals for the Fourth Circuit was entered on April 19, 2004, and this petition for a writ of certiorari was filed within 90 days of that date. The jurisdiction of this court is invokes under 28 U.S. Code § 1254(1).

STATUTORY PROVISIONS INVOLVED

The Lanham Act provides in relevant part:

Sec. 1125. - False designations of origin, false descriptions, and dilution forbidden

(a) Civil action

(1)

Any person who, on or in connection with any goods or services, or any container for goods, uses in commerce any word, term, name, symbol, or device, or any combination thereof, or any false designation of origin, false or misleading description of fact, or false or misleading representation of fact, which -

(A)

is likely to cause confusion, or to cause mistake, or to deceive as to the affiliation, connection, or association of such person with another person, or as to the origin, sponsorship, or approval of his or her goods, services, or commercial activities by another person, or

(B)

in commercial advertising or promotion, misrepresents the nature, characteristics, qualities, or geographic origin of his or her or another person's goods, services, or commercial activities, shall be liable in a civil action by any person who believes that he or she is or is likely to be damaged by such act.

(2)

As used in this subsection, the term "any person" includes any State, instrumentality of a State or employee of a State or instrumentality of a State acting in his or her official capacity. Any State, and any such instrumentality, officer, or employee, shall be subject to the provisions of this chapter in the same manner and to the same extent as any nongovernmental entity.

STATEMENT OF THE CASE

Respondents import crabmeat from Thailand and other Asian nations and make it into crab cakes and other crab products in Baltimore, Maryland. A3. Phillips crabcakes contain more than 90% Asian crabmeat. A3.

The Made in the USA Foundation and its members have purchased Phillips crabcakes and other crab products that were labeled "Made in the USA." A3. The Foundation and its members were deceived by the misleading and false country of origin disclosure on the package that the products were Made in the USA, when in fact they were made mostly of imported crab meat. A3.

REASONS FOR GRANTING THE WRIT

I. The Question of Whether Consumers or Consumer Organizations Have the Right to Sue Under the Lanham Act Has Not Been, But Should Be, Decided by this Court.

The United States Supreme Court has not ruled on whether consumers, or consumer organizations, can sue under the Lanham Act to remedy a false designation-of -origin label on a consumer product. Because many circuit courts have ruled that only competitors can sue, and because many competitors also mislabel their products concerning country-of-origin and will therefore not sue, misleading country-of-origin labeling is rampant. *See e.g. Benson v. Kwikset,* California Court of Appeal, Fourth Appellate District, Division Three, Case No. G030956, June 30, 2004. It is important that this court issue a ruling deciding whether consumers, or consumer organizations, have a right to sue under the Lanham Act.

The Lanham Act is clear on its face that "any person" who believes that he or she may be injured by a violation of the act may file a civil action in federal court. The Made in the USA Foundation alleged in the complaint that it, its members and the general public, have been mislead by false country-of-origin labels on respondents crab products. A3. This claim is based on the Lanham Act's prohibition of the false designation of origin of products.

The heart of the Lanham Act is protecting representations of geographic origin. Section

1125(a)(1)(B) provides a cause of action when a company "in commercial advertising or promotion, misrepresents the nature, characteristics, qualities, or ***geographic origin*** of his or her or another person's goods. . . ." (emphasis added). Respondents Phillips Foods and Philips Seafood Grill, Inc. have grossly misrepresented the geographic origin of its crab products, and have passed off Asian crab as Maryland crab. A3. To let Phillips escape liability for this fraudulent activity would be a gross travesty of justice, directly contrary to the clear intent of the Lanham Act. Ruling that a consumer organization, or consumers, who have been injured, cannot sue a company for misrepresentation of the country of origin will not open the floodgates of litigation. To the contrary, ruling that companies can mislead consumers about country of origin without penalty will open the floodgates for companies to mislead consumers.

This court can take judicial notice that the U.S. economy has lost three million manufacturing jobs in the past two years. United States Bureau of Labor Statistics, www.bls.gov. This court can further take judicial notice that thousands of American companies have relocated overseas and that the United States trade deficit is at an all-time high of more than $500 billion per year and climbing. U.S. Census Bureau, http://www.census.gov/indicator/www/ustrade.html. Phillips is one of the companies that has moved production offshore. Many years ago Phillips used only Chesapeake Bay crabs. Phillips is on the leading edge of companies moving offshore and at the same time attempting to pass itself off as the producer of American-made goods. Consumers have a right to

know the country of origin of products that they are considering purchasing, and the Lanham Act gives them the right to sue if the origin of these products is misrepresented.

The starting point for an analysis of the right to sue for violations of an act of Congress is the statutory language. A principal canon of interpretation of statutes provides that if the statute is clear on its face and unambiguous, there is no reason to inquire into legislative history. *United Air Lines, Inc. v. McMann*, 434 U.S. 192, 199 (1977).

The Lanham Act is clear on its face that consumers have a right to sue. The relevant portions of the Lanham Act are quite brief:

> Sec. 1125. - False designations of origin, false descriptions, and dilution forbidden
>
> **(a)** Civil action
>
> (1)
>
> Any person who, on or in connection with any goods or services, or any container for goods, uses in commerce any word, term, name, symbol, or device, or any combination thereof, or any false designation of origin, false or misleading description of fact, or false or misleading representation of fact, which -

(A)

is likely to cause confusion, or to cause mistake, or to deceive as to the affiliation, connection, or association of such person with another person, or as to the origin, sponsorship, or approval of his or her goods, services, or commercial activities by another person, or

(B)

in commercial advertising or promotion, misrepresents the nature, characteristics, qualities, or geographic origin of his or her or another person's goods, services, or commercial activities, ***shall be liable in a civil action by any person who believes that he or she is or is likely to be damaged by such act.***

(2)

As used in this subsection, the term "any person" includes any State, instrumentality of a State or employee of a State or instrumentality of a State acting in his or her official capacity. Any State, and any such instrumentality, officer, or employee, shall be subject to the provisions of this chapter in the same manner and to the same extent as any nongovernmental entity. (emphasis added).

The Made in the USA Foundation brought this case because the Foundation, its members and the general public were deceived by false and misleading labeling on crab products. A3. The Foundation sued as a consumer and as a representative of consumers, its members and others, who desire to purchase products made in the United States. A2. A3.

Made in the USA Foundation is suing as more than a consumer. The sole purpose of the Foundation is to promote American-made products. When a company, such as Phillips, falsely states or misleadingly implies that its products are "Made in the USA," the Foundation and its members are harmed. This false designation of origin confuses consumers and actually confused many members of the Made in the USA Foundation. The Foundation is harmed not only as a consumer, but as an organization. The financial well-being of the Foundation is harmed by Phillips' misrepresentations because they add to the consumer misconception about what is made in the USA. The Foundation relied on Phillips' Made in the USA packaging to recommend the purchase of its products to thousands of consumers. When consumers learned the truth about Phillips' imported crab products, it harmed the reputation of the Foundation and added to the confusion about what products are in fact made in the USA.

The Made in the USA Foundation was formed to protect the meaning and value of the "Made in the USA" label. This is a "reasonable interest to be protected" under the Lanham Act. *Quabaug Rubber Co. v. Fabiano Shoe Co., Inc.*, 567 F.2d 154, 160 (1st Cir. 1977).

The weight of authority is on its side that the Lanham Act provides a cause of action for any person harmed by a false designation of origin. The cases now generally hold that, to have standing to sue under the Lanham Act, a party must have "a reasonable interest to be protected" against activities that violate the Act. *See Dovenmuehle v. Gilldorn Mortgage Midwest Corp.*, 871 F.2d 697, 700 (7th Cir. 1989); *Berni v. International Gourmet Restaurants of America*, 838 F.2d 642 (2d Cir. 1988); *Johnson & Johnson v. Carter-Wallace, Inc.*, 631 F.2d 186, 190 (2d Cir. 1980); *Quabaug Rubber Co. v. Fabiano Shoe Co., Inc.*, 567 F.2d 154, 160 (1st Cir. 1977).

The Made in the USA Foundation has a "reasonable interest to be protected." That interest is for the benefit of consumers in general, and its members in particular, to know where products are manufactured, and to avoid imports if that is what the consumer desires.

In *Thorn v. Reliance Van Co.*, 736 F.2d 929 (3d Cir. 1984), Judge Leon Higginbotham writing for the Third Circuit ruled "under a plain meaning interpretation of section 43(a) it is this court's function to grant standing to Thorn if his is a person who believes that he has been damaged by Reliance's use of false misrepresentations." 736 F.2d at 932. Judge Higgenbotham criticizes the Second Circuit's *Colligan v. Activities Club of New York*, 442 F.2d 686 (1971): "The Second Circuit's restrictive reading of section 43(a) is contrary to the widely-held view that as a remedial statute, this section should be broadly construed." 736 F.2d at 932.

It is understandable why the Second Circuit issued its ruling in *Colligan, supra.* The case was a small claim on behalf of disgruntled students who claimed that their ski trip was other than as advertised. The circuit court found that the plaintiffs' lawyers were attempting to find an end run around the amount in controversy provision in federal law, and closed the door on such an attempt. But it is clear that *Colligan* was not a "false-designation-of-origin" claim.

The "false-designation-of-origin" cause of action is derived from the 1920 Trademark Act. Section 3 of that law provided:

> That any person who shall willfully . . . affix, . . . or use in connection with any article . . . a false designation of origin . . . shall be liable to an action for damages and to an action in equity for an injunction, ***at the suit of any person, firm or corporation doing business in the locality falsely indicated as that of origin,*** or in the region in which said locality is situated, or at the suit of any association or such persons, firms or corporation. Senate Report "Providing for the Registration and Protection of Trademarks Used in Commerce, to Carry Out the Provisions of Certain International Conventions, 78th Congress, 2d Session, Report No. 1303, December 4, 1944, at 15. (emphasis added).

The Made in the USA Foundation is located in Maryland. A3. The Made in the USA Foundation, undeniably, could have filed suit under the original statute.

In 1925 a representative of the U.S. Trademark Association, stated before a joint congressional committee considering changes in the law, which became Section 43(a):

> It provides that any person who is damaged by false description may start the suit. ***Obviously, the purchaser might claim that he had been misled and damage and start suit.*** At any rate, if it is intended to limit the right to start such a suit, that limitation should be stated. Joint Hearings Before the Committee on Patents, 68th Congress, 2d Sess. 127-128 (1925) (statement of Arthur W. Barber)(emphasis added).

Congress, never did state its intention to limit suits under the Lanham Act. The confusion came after Congress added false advertising claims to the Lanham Act, opening the door to cases like *Colligan, supra.*

Because there is confusion among the many circuit court decisions, this court should grant a writ of certiorari to determine whether consumers and consumer organizations have a right to sue for false designations of origin of products.

II. There is a Conflict Among the Decisions of the Circuit Courts.

Several of the circuit courts have held that a non-profit trade association has standing to sue under the Lanham Act when a false or misleading designation of origin causes confusion even when the association has no proprietary rights to the trademark in question. *Jewelers Vigilance Committee, Inc. v. Ullenberg Corp.*, 823 F.2d 490, 2 USPQ2d 2021 (Fed. Cir. 1987); *Scotch Whisky Association v. Majestic Distilling Co.* (958 F.2d 594, 4th Cir. 1992) [This case is in consistent with the Fourth Circuit's ruling in *Made in the USA Foundation v. Phillips Foods, Inc., supra,* since a non-profit association was found to have standing to sue]. In the *Jewelers Vigilance* case the committee challenged the trademark "Forever Yours/DeBeers Dia. Ltd." The Jewelers Vigilance Committee argued that that mark was confusing compared with the DeBeers mark. The Committee had no rights to either mark, but wanted to prevent consumer confusion. The Made in the USA Foundation is in a similar position because it wants to prevent consumer confusion. The Made in the USA Foundation has standing to protect country-of-origin labeling requirements, just as the *Jewelers Vigilance Committee* had standing to protect the meaning of the DeBeers label.

Similarly, in *Camel Hair and Cashmere Institute of America, Inc. v. Associated Dry Goods Corp.*, 799 F.2d 6 (1st Cir. 1986), the court ruled that a non-profit organization could sue under the Lanham Act. In that case ***none*** of the group's members competed with Associated Dry Goods. 799 F.2d at 12. The First

Circuit ruled "their position as manufacturers gives them a strong interest in preserving cashmere's reputation as a high quality fibre." 799 F.2d at 12. The Made in the USA's position is the same as the Camel Hair and Cashmere Institute's in preserving the reputation and integrity of a well-known label, the "Made in the USA" label.

Because there is a conflict among the circuit courts concerning the right of non-profit organizations to sue under the Lanham Act, this court should grant certiorari to resolve the differences.

CONCLUSION

Congress clearly intended a remedy for companies who falsely designate the origin of their products. The Trademark Act of 1920 expressly provided for such lawsuits. The law was amended to expand, not contract, the rights of those who could bring suits in federal court. The confusion has been caused by broad language against false advertising. Some courts have limited false advertising claims that could be brought in federal court under the Lanham Act. But until the Fourth Circuit ruled in the instant case, no court had ruled that a false designation of origin cannot be remedied by court action by "any person" injured by the false designation of origin.[2]

Consumers have a right to know the country of origin of products that they are considering purchasing, and the Lanham Act gives them the right to sue if the origin of these products is misrepresented. Workers, suppliers and manufacturers who produce

these products have a right to make sure that consumers know the country of origin of their products.

Should Phillips be allowed to continue to mislead consumers by providing false country-of-origin labels on its products? Petitioners contend that the purpose of the Lanham Act was to provide a remedy to challenge such a false and misleading designation of origin.

The Made in the USA Foundation is suing as more than a consumer. The sole purpose of the Foundation is to promote American-made products. When a company, such as Phillips, falsely states or misleadingly implies that its products are "Made in the USA", the Foundation and its members are harmed. This false designation of origin confuses consumers and actually confused many members of the Made in the USA Foundation. The Foundation is harmed not only as a consumer, but as an organization. The financial well-being of the Foundation is harmed by respondents' misrepresentations because this adds to the consumer misconception about what is made in the USA. Defendants' confusing advertisements add to the general misconception that "nothing is made in the USA." This misconception and confusion harms the financial well-being of the Made in the USA Foundation, because if nothing is "made in the USA," why should citizens support the Made in the USA Foundation?

The Made in the USA Foundation was formed to protect the meaning and value of the "Made in the

USA" label. This is a "reasonable interest to be protected" under the Lanham Act. *Quabaug Rubber Co. v. Fabiano Shoe Co., Inc.*, 567 F.2d 154, 160 (1st Cir. 1977).

For all of these reasons the petition for a writ of certiorari should be granted.

Respectfully submitted,

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